Supreme Court, U.S.
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No. 89-1554

IN THE

Supreme Court of the United States

October Term 1990

ROBERT E. BLACKWELDER, et al.,

Petitioners,

VS.

LIFE AND HEALTH SERVICES, INC., et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR RESPONDENT HARBOR INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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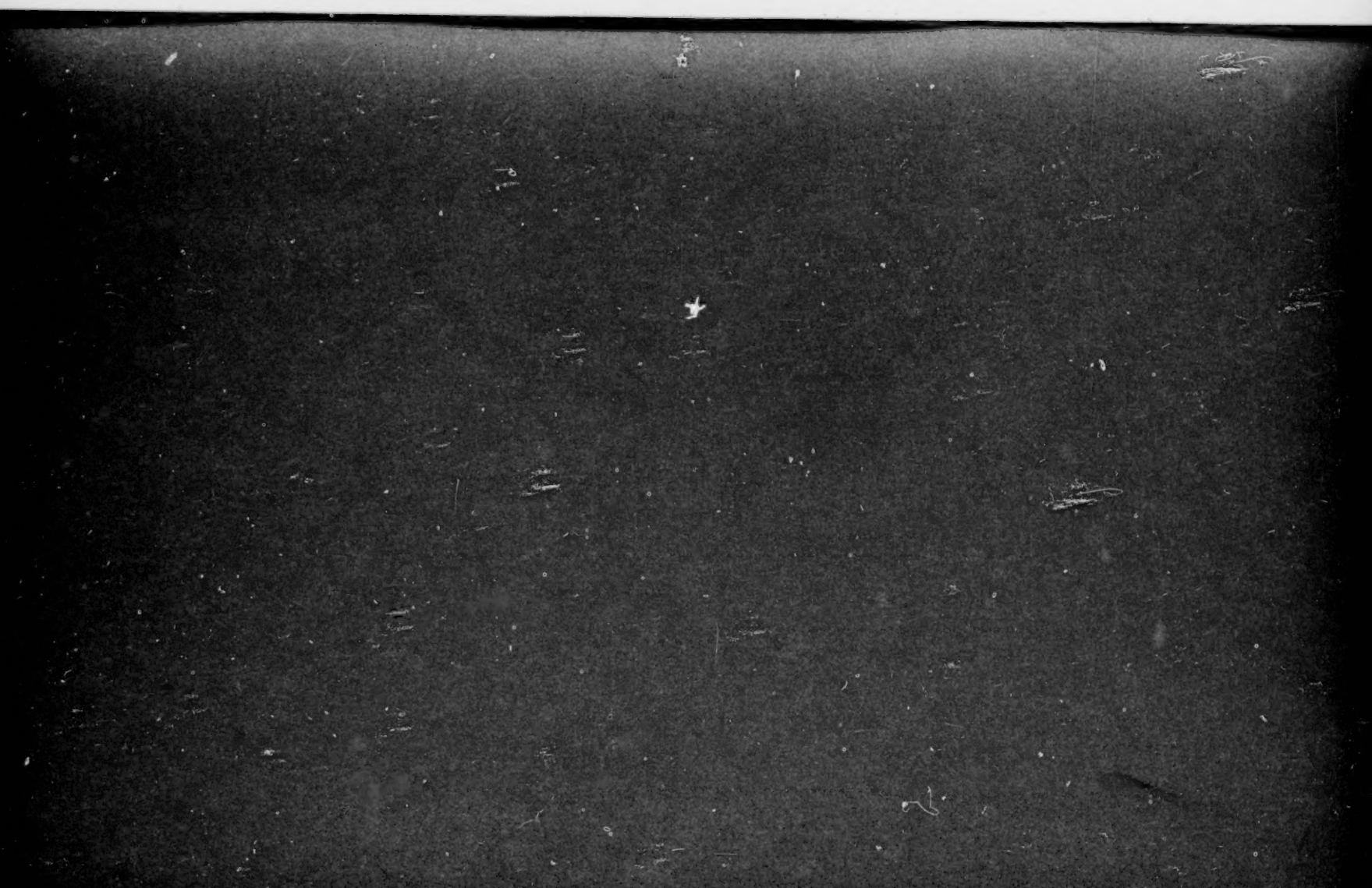

QUESTION PRESENTED FOR REVIEW

I. Whether a self-funded employee welfare benefit plan available to employees of the Junior, Community, and Technical Colleges of the State of Alabama in 1981 and 1982, was a "governmental plan" as defined in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(32) [ERISA].

PARTIES

In the Supreme Court of Alabama, the parties were:

1. Robert E. Blackwelder, as representative of a class of persons who were participants in a self-funded employee welfare benefit plan, known as the Alabama Junior/Community Colleges and Technical Colleges Employee Benefit Plan, who incurred medical expenses which were presented to the Plan, but were not paid. Plaintiffs/Appellees.

2. Mary R. Holley, as representative of a class of persons who were participants in the Plan, who either incurred no medical expenses or who presented medical expenses to the Plan which were paid. Plaintiffs/Appellees.

3. Life and Health Services, Inc., administrator of the Plan. Defendant/Appellant.

4. Betty Duncan, as Administratrix of the Estate of Robert E. Wilder, President of Life and Health Services, Inc. Defendant/Appellant.

5. Harbor Insurance Company, reinsurer of the Plan. Defendant/Appellant.[1]

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1. Pursuant to Supreme Court Rule 28.1, please take note that Harbor Insurance Company is a wholly owned subsidiary of The Continental Corporation. Its affiliated companies are listed in Appendix I attached hereto.

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OPINIONS BELOW

There was no opinion issued by the Circuit Court for Montgomery County, Alabama, which addressed the issue presented here for review. On December 30, 1987, the Circuit Court for Montgomery County (Fifteenth Judicial Circuit) entered an "Order on Pending Motions and Judgment On Nonjury Issue," in which it held that the self-insurance fund at issue in this case was a governmental plan as defined by ERISA, and is exempted from ERISA requirements, so as not to preclude common-law causes of action. Judgment was entered in favor of the plaintiff classes and against the defendants on this issue. See Appendix A attached hereto. The defendants appealed the case to the Supreme Court of Alabama, where consoli dated appeals were assigned Supreme Court Case Nos. 87-391, 87-407, and 87-487.

On September 29, 1989, the Alabama Supreme Court rendered its opinion which, in part, reversed some of the judgments entered by the Trial Court. As pertinent to the Question Presented, the Court ruled, by a six to three vote, that the Trial Court erred in its holding that the Plan was a governmental plan exempt from the provisions of ERISA. *Harbor Insurance Co. v. Blackwelder, et al.*, 554 So.2d 329 (Ala. 1989). See Appendix B attached hereto.

The Application for Rehearing filed on behalf of the Plaintiffs/ Appellees was denied without opinion on November 17, 1989. See Appendix C attached hereto.

JURISDICTION

Respondent Harbor Insurance Company concedes that the Petitioners' statement of jurisdiction is sufficient to enable this Court to entertain its Petition for Writ of Certiorari, pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions recited in the Petition for Writ of Certiorari, the following additional provision of the Employee Retirement Income Security Act of 1974 is involved in the issue presented by the Petition:

"29 U.S.C. § 1144. **Other laws.**

(a) **Supersedure; effective date.** Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]. . . .

***

(c) **Definitions.** For purposes of this section:

(1) The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . ."

STATEMENT OF THE CASE

A. *Identification of the Parties*

The Petitioners before this Court are two classes of persons employed by 28 of the 43 junior, community and technical colleges operated by the State of Alabama in 1981 and 1982. Each of the Petitioners elected to participate in an employee welfare benefit plan created in 1981, known as the Alabama Junior/Community Colleges and Technical Colleges Employee Benefit Plan (hereinafter referred to as the "Plan").

Respondent Life & Health Services, Inc. (hereinafter "Life & Health") contracted to assist in the creation and administration of the Plan, and was instrumental in promoting the Plan to the Petitioners. Robert Wilder was the president of Life & Health.

Respondent Harbor Insurance Company provided reinsurance of a portion of the benefits offered by the Plan, pursuant to an Excess Medical Stop-Loss Reinsurance Agreement. The Reinsurance Agreement obligated Harbor to reimburse the Plan for certain amounts of health benefits paid in excess of stated "attachment points," which are somewhat similar to deductibles in traditional health insurance policies.

B. *Control of the Alabama Junior, Community and Technical College System*

Prior to May 4, 1982, the Alabama Trade School and Junior College Authority Act, *Ala. Code* §§ 16-60-80, *et seq.*, (1975)[2], charged the Alabama State Board of Education with the responsibility for the "operation, management, control, supervision, maintenance, regulation, upkeep, improvement, equipment, and enlargement of and additions to" Alabama's junior, community and technical colleges. *Ala. Code* § 16-60-111 (1975) (repealed by 1982 Alabama Acts, No. 82-486, § 2, effective May 4, 1982). Effective May 4, 1982, those responsiblities were vested in the Chancellor of Postsecondary Education, subject to approval by the State Board of Education. *Ala. Code* § 16-60-111.2 (1975).

The State Board of Education discharges its statutory duties through regular meetings, the minutes of which are public records. With regard to insurance, the minutes demonstrate that, yearly, the Board received recommendations for the purchase of consolidated liability insurance for all vehicles owned by the junior, community and technical colleges, for specified policy limits, for a specified premium cost, to be purchased through a specified insurance agency, and that the Board passed a resolution approving the purchase of such liability insurance. By contrast, the minutes of the Board meetings between 1979 and the end of 1982 contain no reference to any proposal to study, create, fund, or operate a consolidated employee welfare benefit plan for the employees of the schools.

---

2 Effective May 4, 1982, the Alabama Trade School and Junior College Authority Act was substantially amended, by the creation of the Postsecondary Education Department, defined as a "parallel organization to the state department of education directly responsible to the state department of education for the direction and supervision of junior colleges and trade schools and community colleges with a chief executive officer entitled a chancellor." *Ala. Code* § 16-60-110(6) (1975).

In September of 1981, the State Board of Education passed a resolution which stated that "hospital medical insurance assistance will be provided for all full-time employees in Alabama's public junior, community and technical colleges/institutes and Athens State College and that this assistance will not exceed Three Hundred Nine Dollars ($309) per year per person." There was no restriction on the use of the funds by the employees for the purchase of any particular insurance, nor were the funds deemed available only for the purchase of "authorized" or "approved" insurance programs.

C. *Creation of the Plan*

In the fall of 1980, the Alabama Junior Colleges Presidents Association and the Alabama Technical Colleges Presidents Association formed a joint committee, called the Presidents Insurance Committee, to study the existing health insurance programs of the various schools. The Presidents Insurance Committee determined that a consolidated self-funded employee benefit plan should be created, and thereafter considered a plan offered by Central Bank, in association with Blue Cross. However, before the Central Bank-Blue Cross plan was adopted, committee member Dr. William McWhorter contacted Life & Health and solicited a competitive bid for a consolidated health benefit program.

Life & Health prepared its own proposal for a consolidated self-funded employee benefit plan, which included medical and hospital benefits to be provided through a trust funded by contributions from those employees who elected to participate, excess stop-loss reinsurance to be purchased from Harbor, and life insurance to be purchased from another insurance company.

In September of 1981, the Presidents Insurance Committee, which by then also included "insurance reps" representing the employees of the schools, heard presentations from a representative of Central

Bank and from Robert Wilder on behalf of Life & Health, and voted to adopt the Plan offered by Life & Health. On September 24, 1981, the Committee, on the letterhead stationery of the Alabama Technical Colleges Presidents Association, sent a memorandum to the president of each school stating that the Presidents Insurance Committee had agreed upon a self-funded medical/health insurance program, and that representatives of Life & Health would soon be contacting them to explain the Plan.

D. *Operation and Demise of the Plan*

The Plan was created and operated pursuant to a Trust Agreement, which was prepared by Life & Health and executed by four junior and technical college presidents and by the secretary to a fifth president, as Trustees. The Trustees also entered into an Administration Services Agreement with Life & Health to administer the Plan, and the above-referenced Excess Medical Stop-Loss Reinsurance Agreement with Harbor.

The stated purpose of the Trust Agreement was to provide and maintain health benefits for participating school employees and their families, to establish a fund of money, and to accumulate as part of that fund an adequate reserve to carry out the purpose of the trust.

In order to fund the trust, the Trust Agreement empowered the Trustees "to demand, collect and receive employer and employee contributions" and "to specify the exact time and manner in which the payment of such contributions are to be made . . . ." On the recommendation of Life & Health, the Trustees adopted employee and family contribution rates ("premiums") which quickly proved insufficient to pay for the health benefit claims submitted on behalf of the employee participants. By the end of the first year the Plan had accumulated approximately $600,000.00 more in payable claims than it had funds to pay. The paid claims did not reach the attachment point of the Harbor Reinsurance Agreement.

Wholesale withdrawal of employees from participation in the Plan occurred at the end of 1982, and the Plan was thereby rendered defunct. Litigation followed in May of 1983.

E. *Course of Proceedings Below*

In May 1983, Life & Health filed a Petition for Declaratory Judgment and Other Relief in the Circuit Court for Montgomery County, Alabama, which sought an order requiring the Plan participants to contribute additional funds to pay the obligations of the Plan, and a declaration that Harbor was obligated to pay a $118,373.44 claim submitted by the Plan under the Reinsurance Agreement. Petitioners Blackwelder and Holley, and others, were named as class representatives of the Plan participants in this declaratory judgment action.

Blackwelder and Holley filed Motions to Dismiss the Life & Health Petition for Declaratory Judgment in July of 1983, on the ground, among others, that Congress has preempted the field and subject matter of employee benefit plans such as that described and made the subject matter of the Petition for Declaratory Judgment. See Appendices D and E attached hereto. These were the first references to the applicability of ERISA to the issues raised in this action. The Trial Court denied the Blackwelder and Holley Motions to Dismiss without opinion. See Appendix F attached hereto.

Thereafter, Blackwelder and Holley sought recovery of damages from Life & Health, the Plan, the Trustees, and Harbor for their alleged violation of the provisions of ERISA, and for negligence, wantonness, fraud, breach of fiduciary duty, bad faith, and breach of contract.

In October of 1983, the Trial Court realigned the parties, designating as plaintiffs the "Blackwelder class" and the "Holley class." Life & Health, the Plan, the Trustees, Wilder, and Harbor were designated as defendants.

The plaintiff classes settled their claims against the Trustees for a payment of $205,000.00.

In April of 1987, Harbor filed a Motion for Partial Summary Judgment seeking, in part, judgment in its favor as to the issue of ERISA's pre-emption of the claims of negligence, wantonness, fraud, and breach of contract asserted against it. See Appendix G attached hereto. The response to this Motion was the first instance in which the "governmental plan" exemption from ERISA was specifically raised. The Trial Court deferred ruling on that aspect of Harbor's Motion for Partial Summary Judgment, until after the trial of the common-law claims asserted against the defendants.

The jury trial of the plaintiffs' common-law claims resulted in verdicts in their favor on their negligence claims against all three defendants, assessing damages of $720,000.00 in favor of the Blackwelder class and $170,000.00 in favor of the Holley class. The jury also returned verdicts against Life & Health and Wilder on the wantonness and fraud claims, and assessed damages under the fraud claims totaling $1,668,000.00 in favor of the Blackwelder class, and $350,000.00 in favor of the Holley class. The jury returned verdicts in favor of Harbor on the plaintiffs' wantonness, fraud, and breach of contract claims.

On December 30, 1987, the Trial Court held that the subject employee benefit plan was a governmental plan as that term is defined in ERISA, and that, therefore, the plaintiffs' common-law claims against Harbor and the other defendants were not pre-empted. See Appendix A attached hereto.

The defendants appealed to the Alabama Supreme Court which, on September 29, 1989, reversed all judgments entered in favor of the plaintiffs on the negligence and wantonness claims, but affirmed the judgments entered in their favor against Life & Health and Wilder on the fraud claims. *Harbor Insurance Co. v. Blackwelder*, 554 So.2d 329 (Ala. 1989). See Appendix B attached hereto. The Alabama Supreme Court opinion held that the Plan was not a governmental plan within the meaning of ERISA; that the provisions of 29 U.S.C. § 1144 pre-empted the plaintiffs' common-law claims of negligence and wantonness; but that the fraud claims did not "relate to" an employee benefit plan, and thus were not within the scope of claims pre-empted by 29 U.S.C. § 1144.

The plaintiffs filed an Application for Rehearing with the Alabama Supreme Court, which was denied without opinion on November 17, 1989. See Appendix C attached hereto.

ARGUMENT
WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

A. *Petitioners' First Question Presented Asserts Facts Not Supported By The Record*

The Petitioners' first question presented avers that the Plan "is funded primarily by state government." Harbor contends that this assertion is not supported by the record. The only evidence of any funding of the Plan to which the Petitioners' averment could relate is the 1981 resolution of the State Board of Education authorizing $309.00 per year for all full-time employees of the junior, community and technical college system, for "hospital medical insurance assistance." Some employees of 28 of the 43 schools participated in the Plan. No employees of the remaining 15 schools elected to participate. The Board resolution authorized the funds to be paid to all employees of all schools.

The opinion of the Alabama Supreme Court addressed this matter:

> "The only fact that supports the allegation that the Plan was maintained by the state is that part of the premiums paid by the participants came from funds provided by the state, to all similarly situated employees, that these employees could use to pay for part of any insurance coverage they chose. This payment, which came indirectly from the state, is not sufficient to support a conclusion that the Plan was maintained by the State." 554 So.2d 329, 333. Appendix B, p. 8.

B. *Petitioners' Second Question Presented Was Not Raised In A Timely Manner Below*

The Petitioners' second question presented seeks the Court's review of the issue of whether the Plan met ERISA's definition of "employee welfare plan" because it (allegedly) was not established or maintained by an employer or employee organization. This matter was raised for the first time when the Petitioners submitted to the Alabama Supreme Court their Brief in Support of Application for Rehearing.

In the Trial Court, the Petitioners averred in their July 1983 initial substantive pleading that "[a]t all times hereinafter mentioned Alabama Junior/Community Colleges and Technical Colleges Benefit Plan, a non-profit trust, was and is duly organized and existing 'qualified plan' as defined in Title 29 USCS Section Section 1001, et seq." [sic]. The Pretrial Order entered five days prior to the trial of this action, on July 8, 1987, included 28 numbered contentions of the Petitioners, none of which suggested that the Plan did not meet ERISA's definition of "employee welfare plan."

Appendix H sets forth copies of the Statement of Issues contained in the Brief of Appellant Harbor Insurance Company, and the Issues Presented for Review contained in the Brief of Appellee Robert E. Blackwelder, et al., presented to the Alabama Supreme Court.

The opinion of the Alabama Supreme Court states:

> "It is undisputed that the Plan involved in the present appeal is an employee benefit plan covered by the provisions of ERISA. There is a dispute, however, over whether [the governmental plan] exception to coverage applies. . . ." 554 So.2d 329, 331-32, Appendix B, p. 5.

Until the Alabama Supreme Court reversed the judgments entered against Harbor, the question of whether the Plan met ERISA's definition of "employee welfare plan" had never been raised and was not an issue in this case.

Moreover, the evidence is clear that the Presidents Insurance Committee, which established the Plan, met ERISA's definition of "employee organization" set forth in 29 U.S.C. §1002(4). See ERISA Op. Letter No. 79-62A (1979). The Plan thus met ERISA's definition of "employee welfare benefit plan" found at 29 U.S.C. §1002(1).

C. *The Opinion of the Alabama Supreme Court Does Not Conflict With The Federal Statutes, Federal Decisions or Opinion Letters of the United States Department of Labor*

The Clerk's Record of the appeal in this case contains over 3,100 pages. The Reporter's Transcript spans another 1,593 pages. The opinion of the Alabama Supreme Court begins its discussion by noting that the facts which led to this appeal are "somewhat complicated." 554 So.2d 329, 330, Appendix B, p. 2.

The Alabama Supreme Court opinion addresses each of the three reported decisions of the United States Court of Appeals and the United States District Courts which explore in detail the governmental plan exemption:

Rose v. Long Island R.R. Pension Plan, 828 F.2d 910 (2d Cir. 1987), *cert. denied*, 485 U.S. 936, 108 S.Ct. 1112, 99 L.Ed.2d 273 (1988);

Feinstein v. Lewis, 477 F.Supp. 1256 (S.D. N.Y. 1979); and

Krupp v. Lincoln University, 663 F.Supp. 289 (E.D. Pa. 1987).

In light of the holdings of those three cases, as well as various ERISA opinion letters issued by the Department of Labor, the Alabama Supreme Court concluded that "under the totality of the circumstances" and "the particular facts of the present case," the subject Plan was not a governmental plan. 554 So.2d 329, 333; Appendix B, pp. 8, 10.

In *Rose*, the Second Circuit Court of Appeals noted that ERISA was enacted in order to remedy long-standing abuses and deficiencies in the private pension system, including insufficient assets to assure payment of future benefit obligations and premature termination of underfunded benefit plans. 828 F.2d 910, 913. The *Rose* opinion also noted that governmental plans were exempted from ERISA for a number of reasons, including the ability of governmental entities to fulfill their benefit obligations to their employees through their taxing powers. 828 F.2d 910, 914. The Court observed that "LIRR employees, therefore, like other governmental employees, can depend on the State's taxing power to protect their right to retirement income." 828 F.2d 910, 918.

The Plan now before this Court had insufficient assets to assure the payment of its benefit obligations, was underfunded, and as a result became insolvent and defunct after barely one year of operation. The very deficiencies which ERISA was enacted to remedy existed in this Plan. The key advantage of true governmental plans, and the primary justification for their exemption from ERISA—public funding—was not available to this Plan.

In *Feinstein*, the employee welfare benefit plans at issue were established pursuant to collective bargaining agreements between a teacher's union and four employers, two municipalities and two public school districts. The plans were exclusively funded by contributions from the employers. The traditional governmental bodies there played a direct role in both the establishment and maintenance of the plans, and the plans were properly found to have met the ERISA

definition of governmental plan.

In *Krupp*, Lincoln University had a self-insured group health plan. The Pennsylvania legislature had enacted the Lincoln University Commonwealth Act, 24 P.S. §§ 25-10-401, *et seq.*, to establish Lincoln University as "an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education." 24 P.S. §§ 25-10-402(7). The District Court in *Krupp* noted that the Commonwealth Act was enacted to allow Pennsylvania to provide greater financial support to Lincoln University than it could under prior law. Despite these facts, the Court properly held that there was no traditional governmental entity which either established or maintained Lincoln University's employee welfare benefit plan, and that the Plan neither met ERISA's definition of governmental plan nor satisfied any of the policy reasons behind the exemption of governmental plans from ERISA's coverage.

The creators and administrators of the Plan at issue before this Court were not traditional governmental entities. They were the Presidents Insurance Committee, comprised of representatives of the Alabama Junior Colleges Presidents Association and the Alabama Technical Colleges Presidents Association, and "insurance reps" acting on behalf of the employees of the various schools. They sought neither the advice nor the approval of the State agency charged by law with the control of the junior, community and technical college system—the Alabama State Board of Education— before they established, funded, administered, and abandoned the Plan.

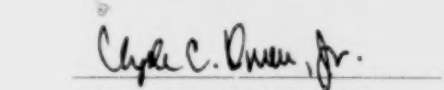
In view of the peculiar facts surrounding the creation and operation of this Plan, the Alabama Supreme Court's holding that it was not a governmental plan is entirely consistent with the holdings and rationale of *Rose, Feinstein*, and *Krupp*. This case, and those three cases, provide a harmonious discussion of what facts do, and what facts do not, demonstrate the existence of a bona fide governmental plan, exempt from the provisions of ERISA.

CONCLUSION

The Petitioners in this case were afforded every opportunity to redress their grievances. They have already secured $205,000.00 in satisfaction of their claims against the Plan Trustees, and remain free to pursue collection of the more than $2 million in judgments upheld in their favor against Life & Health and Wilder.

The opinion of the Alabama Supreme Court addressing the governmental plan issue is not contrary to, but is entirely consistent with, the opinions of the United States Court of Appeals for the Second Circuit, the United States District Courts for the Southern District of New York and the Eastern District of Pennsylvania, and with the published opinions of the United States Department of Labor. The Petition for Writ of Certiorari demonstrates neither grounds, need, nor reason for this Court to accept this case for further review.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Clyde C. Owen, Jr., a member of the Bar of the Supreme Court of the United States and attorney for the Respondent, Harbor Insurance Company, do hereby certify that on this 24th day of April, 1990, I did serve the requisite number of copies of the foregoing on the attorneys for the Petitioners and for Respondents Life & Health Services, Inc. and Betty Duncan, by mailing the same to them first-class, postage prepaid and properly addressed as follows:

Hon. George L. Beck, Jr.
Post Office Box 5019
Montgomery, Alabama 36103

Hon. C. Knox McLaney III
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APPENDICES

APPENDICES

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APPENDIX A

(Order Entered December 30, 1987)

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. CV-83-640-G

ROBERT E. BLACKWELDER, et al.,
Plaintiffs,

vs.

ALABAMA JUNIOR/COMMUNITY COLLEGES, et al.,
Defendants.

ORDER ON PENDING MOTIONS AND JUDGMENT
ON NON JURY ISSUE

It is ORDERED, as follows:

1. All post-judgment motions filed by the defendants are, Denied.

2. The court holds that the self insurance fund at issue in this case was a governmental plan as defined by ERISA, and, as such, is specifically exempted from ERISA requirements so as not to preclude the common law causes of action. Judgment is entered in favor of the plaintiff classes and against the defendants on this issue.

DONE and ORDERED in chambers this the 30th day of December, 1987.

WILLIAM R. GORDON
CIRCUIT JUDGE

cc: Clyde C. Owen, Jr.
George L. Beck
Henry C. Barnett, Jr.
C. Knox McLaney, III
Robert S. Lamar

APPENDIX B

(Opinion Released September 29, 1989)

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1989

Harbor Insurance Company
87-391,-407

v.

Robert E. Blackwelder, et al.

Life and Health Services, Inc.
and Robert Wilder
87-487

v.

Robert E. Blackwelder, et al.

Appeals from Montgomery Circuit Court
(CV-83-640-G)

JONES, JUSTICE.

These appeals are from final judgments entered upon jury verdicts in favor of two classes of plaintiffs. The plaintiffs were all participants in an insurance plan that, due to underfunding, was unable to pay its obligations and failed. Because the plan in question is not a "governmental plan," as that term is used in the Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. § 1001 et seq.), we hold that, except for their fraud claims against Life and Health Services,

Inc. (''L&H''), and its president, Robert Wilder, the plaintiffs' common law claims are preempted by ERISA; therefore, the judgments against L&H and Wilder based on fraud are affirmed; the remaining judgments against Wilder and L&H, and the judgments against Harbor Insurance Company (''Harbor'') are reversed; and the cause is remanded for entry of judgments consistent with this opinion.

The facts that led to this appeal are somewhat complicated, but they can be summarized for the purposes of this opinion. In January 1980, Dr. William McWhorter, the president of one of Alabama's junior colleges, became interested in organizing a consolidated health insurance plan for all of Alabama's junior, community, and technical colleges.[1] He sent questionnaires to the presidents of the other schools to ascertain their interest in such a plan. Once the results were compiled, they were provided to L&H, a third-party administrator of insurance plans with which Dr. McWhorter had had periodic contact concerning the then-existing insurance plan at his college.

In the fall of 1980, a joint committee of presidents of the colleges (''the Committee'') was appointed by the Presidents' Association to study the then-existing insurance plans of the schools and to make recommendations for any changes. The Committee concluded that a self-funded insurance plan should be created; and it initially recommended a plan offered by Central Bank in association with Blue Cross, with life insurance provided by American Foundation Life Insurance Company.

The Committee again contacted L&H, this time to determine whether L&H could offer a better rate for the same coverage offered by Central Bank. Wilder undertook the task of ''selling'' the L&H plan to the Committee and, subsequently, to the individual employees. Although he knew that the plan was underfunded, based on the cal-

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[1]The Alabama Trade School and Junior College Authority Act is codified at Ala. Code 1975, § 16-60-80 et seq.

culations and assumptions upon which it was premised, Wilder failed to disclose this fact to either the Committee or to the individual employees who chose to accept the plan.

The alternative plan proposed by L&H called for lower premiums than did the plan offered by Central Bank, and it was accepted by the Committee. This plan was reinsured by Harbor. The acceptance of the L&H plan led to the creation of the Alabama Junior/Community Colleges and Technical Colleges Employee Benefit Plan ("the Plan"). The Plan was subsequently presented to the employees of the schools and, eventually, over 1,300 employees at 28 of the schools decided to participate. The Plan collapsed after just one year of operation.

Following the collapse of the Plan, certain participants instituted several actions to recover damages from Wilder, L&H, and Harbor. After certification of the classes and consolidation of the actions, the cases proceeded to trial. The trial court ruled that the Plan was a "governmental plan" and, therefore, exempt from the provisions of ERISA. The jury returned special verdicts against Harbor on negligence claims, and against Wilder and L&H on negligence, wantonness, and fraud claims. These appeals followed.

On appeal, as at trial, the parties raise the issue of the preemptive effect of ERISA. Two threshold questions are presented: 1) Whether the Plan is one "established or maintained" by a governmental body and thus excepted from ERISA's operative effect; and 2) whether the plaintiffs' claims for fraud against Wilder and L&H fall outside the operative effect of the federal act. Because we find that the "governmental plan" exception to ERISA does not apply, we hold that the common law causes of action based upon negligence and wantonness, under which the plaintiffs recovered against all of the defendants, are preempted; thus, the judgments based on these claims are reversed. We further hold that the fraud claims against Wilder and L&H, amounting to claims for fraudulent inducement, are not preempted; thus, the judgments against these defendants on that claim are affirmed.

I

In our treatment of the "governmental plan" exception, we have undertaken a three-part analysis: 1) The first step, when examining any insurance or benefit plan, is to determine whether the plan falls within the scope of ERISA's coverage; 2) if the plan is so covered, then we must next examine the exceptions to ERISA to ascertain whether any of them apply; and, finally, 3) if we find that the plan is within ERISA's coverage, and that no exception applies, we must examine the preemptive effect of these determinations.

Our inquiry begins with the language of the statute itself. The applicable section of ERISA, governing the scope of its coverage, is found at 29 U.S.C. § 1003:

> "(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—
>
> "(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
>
> "(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
>
> "(3) by both.
>
> "(b) The provisions of this subchapter shall not apply to an employee benefit plan if (1) such plan is a governmental plan (as defined in section 1002(32) of this title). . . ."

The definitions of an "employee welfare benefit plan" and of a

"governmental plan" are found at 29 U.S.C. § 1002, which states, in relevant part:

> "(1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . .
>
> "....
>
> "(32) The term 'governmental plan' means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

It is undisputed that the Plan involved in the present appeal is an employee benefit plan covered by the provisions of ERISA.[2] There is a dispute, however, over whether an exception to coverage applies. As noted earlier, the trial court ruled that the "governmental plan" exception applied and, therefore, that ERISA did not control the determination of liability under the Plan. We disagree.

---

[2]It is important to note here that while the *Plan* is covered by ERISA, a further determination is required to test ERISA's preemptive effect on the separate state law claims on which the special verdicts were based. See our later discussion of the fraud-in-the-inducement claims under part II of this opinion.

Although the "governmental plan" exception has been discussed in several cases, an analysis of the available authority leaves us without a clear, definitive standard by which we may determine whether the Plan is a governmental plan. Thus, any plan must be closely examined to determine whether it falls within this exception to the coverage of ERISA. Initially, we must bear in mind the broad scope of ERISA's preemption in the employee benefit field.

> "In determining whether various benefit policies fall within ERISA, courts should interpret the act's coverage broadly. *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983)."

Scwartz v. Newsweek, Inc., 653 F.Supp. 384,387 (S.D.N.Y. 1986), aff'd, 827 F.2d 879 (2d Cir. 1987).

One of the first cases to discuss the "governmental plan" exception was *Feinstein v. Lewis*, 477 F.Supp. 1256 (S.D.N.Y. 1979), aff'd, 622 F.2d 573 (2d Cir. 1980). In *Feinstein*, the court considered whether employee welfare plans, established as the result of a collective bargaining agreement between a union of public employees and their municipal or school district employers, were "governmental plans." The court went into a thorough discussion of the term "governmental plan" before ruling that the exception applied to the plans in question. In its analysis of the intention of Congress in enacting ERISA, the court stated:

> "These discussions clearly demonstrate that Congress, in exempting governmental plans, was concerned more with the governmental nature of public employees and public employers than with the details of how a plan was established or maintained."

Id. at 1262.

In its holding that the "governmental plan" exception applied, the *Feinstein* court emphasized that the governmental instrumentality, as the employer, provided 100% of the funding for the plans. Further, the *Feinstein* court reasoned that the mere fact that the public employers acted in conjunction with the employees' union, pursuant to a collective bargaining agreement, to establish and maintain the benefit plan, "does not lead us to the conclusion that the plan was not 'established' by the [public employers]." *Id.* at 1260.

An equally extensive discussion of the 'governmental plan' exception is found in *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910 (2d Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1112, 99 L.Ed.2d 273 (1988). The court in *Rose* ruled that a plan established by the Long Island Railroad was, under the facts of the case, a governmental plan. Of particular interest is the analysis used by the *Rose* court to define the terms "agency or instrumentality." These two terms are not defined in ERISA; but the *Rose* court reasoned that the definitions given these terms by the Internal Revenue Service, one of the agencies charged with enforcing ERISA, were entitled to great deference. The term "governmental plan" is defined at 26 U.S.C. § 414(d), and this definition is virtually identical to the one found at 29 U.S.C. § 1002(32).

> "In interpreting the § 414(d) exemption, the IRS has consistently relied on Revenue Ruling 57-128, 1957-1 C.B. 311, which lists six factors to be considered in determining whether a particular entity is an agency or instrumentality:
>
> "In cases involving the status of an organization as an instrumentality of one or more states or political subdivisions, the following factors are taken into consideration: (1) whether it is used for a governmental purpose and performs a governmental function; (2) whether performance of its function is on behalf of one or more states or

> political subdivisions; (3) whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner; (4) whether control and supervision of the organization is vested in public authority or authorities; (5) if express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and (6) the degree of financial autonomy and the sources of its operating expenses."

Rose, 828 F.2d at 918.

After an examination of these factors, as they relate to the present appeal, we find that the Plan was not established or maintained by an agency or instrumentality of the State of Alabama, or any political subdivision of it. While it could be argued that some of the six factors listed above apply to the Plan, we nonetheless conclude that, under the totality of the circumstances, the Committee was not an agency or instrumentality of the State; thus, the Plan is not a governmental plan.

Because we find that the Committee is not an agency or instrumentality of the state, we further hold that the Plan was not established or maintained by the state. The Plan was established by the independent actions of the presidents of some of Alabama's junior and technical colleges. This clearly does not meet the establishment criteria contained in the "governmental plan" exception. Neither is the Plan maintained by the state. The only fact that supports the allegation that the Plan was maintained by the state is that part of the premiums paid by the participants came from funds provided by the state, to all similarly situated employees, that these employees could use to pay for part of any insurance coverage they chose. This payment, which came directly from the state, is not sufficient to support a conclusion that the Plan was maintained by the State.

Our conclusion is further supported by the fact that the "governmental plan" exception was contemplated as a narrow exception to the otherwise expansive coverage of ERISA. In a federal case quite similar to the present one, the district court discussed the reasons behind a narrow construction of this exception:

> "Indeed, the legislative history's frequent reference to the exception simply as the 'governmental plan' exception, . . . without ever elaborating on the significance of the individual terms chosen to describe the scope of the exception, suggest that the exception was meant to cover the entire range of organizations traditionally characterized as governmental organizations, but not to expand the range to include organizations having some significant relationship with a government but not themselves viewed as governmental."

Krupp v. Lincoln University, 663 F.Supp. 289, 292 (E.D.Pa. 1987).

In *Krupp*, the court ruled that a university's health care plan was not a governmental plan, even though a legislative act had established the university as an instrumentality of the Commonwealth. The fact that the university was characterized as a "state-related institution," reasoned the *Krupp* court, did not mandate that its insurance plan be considered a governmental plan. We approve the rationale for the *Krupp* decision, and we hold that the instant Plan is not a governmental plan.

As was previously mentioned, we realize that there is no clear guide to determine when the "governmental plan" exception to ERISA applies. There have been cases involving colleges in which the insurance plan was properly found to be a governmental plan. See ERISA Op. Letter No. 77-13; and ERISA Op. Letter 76128.

However, under the particular facts of the present case, we do not find these authorities to be controlling here.[3]

Because the "governmental plan" exception does not apply to the instant Plan, the provisions of ERISA are applicable here. The preemptive provisions of ERISA are found at 29 U.S.C. § 1144:

> "Except as otherwise provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975."

In discussing this section, the United States Supreme Court has provided guidance in understanding the scope of the preemptive aspects of ERISA:

> "To summarize the pure mechanics of the provisions quoted above: If a state law 'relate[s] to . . . employee benefit plan[s],' it is pre-empted. § 514(a). The saving clause excepts from the pre-emption clause laws that 'regulat[e] insurance.' § 514(b)(2)(A). The deemer clause makes clear that a state law that 'purport[s] to regulate insurance' cannot deem an employee benefit plan to be an insurance company. § 514(b)(2)(B) [state laws that regulate insurance, banking, or securities are not preempted by ERISA].

---

[3]For a thorough discussion of the "governmental plan" exception and the cases and interpretive releases analyzing it, see RIA *Employment Coordinator*, ¶ B-10131 to B-10133, at 30, 115-118.

> "... We have observed in the past that the express preemption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' [Citations omitted.]"

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987).

II.

In regard to the state common law claims for fraud against Wilder and L&H, we hold that these claims are not preempted under the provisions of ERISA and we affirm that aspect of the trial court's judgments. In the recent case of *HealthAmerica v. Menton*, [Ms. 87-1100, July 21, 1989] _____ So.2d _____ (Ala. 1989), we held that a claim for fraud in the inducement does not "relate to" an employee benefit plan and is therefore not preempted by ERISA.

In the instant case, the plaintiffs, relying upon, among other things, Wilder's misrepresentations that the plan was "fully funded," forwent accepting the plan offered by Central Bank and accepted the L&H Plan. With their acceptance of the L&H Plan, however, the plaintiffs did not receive the promised benefits. The plaintiffs, according to their claim for misrepresentation, were not damaged as a result of the fraudulent administration of the Plan or as a result of non-payment pursuant to the Plan; rather, as a consequence of the misrepresentations and promises of benefits, they were induced to accept the L&H Plan, as opposed to a more adequately funded plan. This "fraud in the inducement" claim is not covered by the provisions of ERISA; therefore, it falls outside ERISA's preemptive effect.

The facts of the instant case fall clearly within the holding in *HealthAmerica*. L&H knew that the Committee had received from Central Bank a proposal for a plan in which the Committee had expressed an interest. In order to "sell" its proposal to the Committee and the schools' personnel, L&H had to offer a plan that was competitive with that proposed by Central Bank. The fraud committed by Wilder, on behalf of L&H (i.e., offering the Plan with knowledge that L&H's own actuarial criteria for a viable plan showed inadequate funding), was aimed at inducing the Committee and the individuals it represented to select L&H's proposal over that of its competitor. Conduct of this nature will not be tolerated in Alabama; and it was not the intent of Congress, in enacting ERISA, to preclude state regulation of such activity. See *HealthAmerica*, *supra*, and the cases cited therein.

L&H contends that the trial court erred in certifying the plaintiff classes because "commonality" and "typicality" do not exist, as required by A.R.Civ.P.23(a)(2) and (3). We disagree, and we hold that there are questions of law and fact common to the classes and that the claims of the representative parties are typical of the claims of the classes.

Although the misrepresentations were made to the members of each class at varying times, the misrepresentations were basically the same and were redressable under the same theory of recovery. Where plaintiffs allege and prove a standard claim for fraud based on misrepresentations with a common thread, as is the case here, their cause is maintainable as a class action.

It is within the sound discretion of the trial court to certify a class under Rule 23, and we will reverse such a ruling only upon a showing of an abuse of that discretion. *Marshall Durbin of Jasper, Inc. v. Jasper Utilities Board of the City of Jasper*, 437 So.2d 1014 (Ala. 1983). We have not been shown that the trial court abused its discretion in certifying the classes in the instant case.

Therefore, the judgments against Wilder and L&H, based on the non-preempted fraud claims, are affirmed; the judgments against all the defendants based on the remaining preempted state law claims are reversed; and the cause is remanded for entry of judgments consistent with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS AS TO 87-391 AND 87407.

AFFIRMED AS TO 87-487.

Hornsby, C.J., and Adams, Steagall, and Kennedy, JJ., concur.

Maddox, Almon, Shores, and Houston, JJ., concur in part and dissent in part.

MADDOX, JUSTICE (concurring in part and dissenting in part).

I concur in the portion of the majority's opinion that holds that the fraud claims are not preempted by ERISA, but because I am of the opinion that this was a "governmental plan," I would hold that none of the claims in this case are preempted, and I would affirm.

ERISA defines "governmental plan" as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." 29 U.S.C. § 1002(32). The factors listed in *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910(2d Cir. 1987), cert. denied, _____ U.S. _____ 108 S.Ct. 1112 (1988), show that the "governmental plan" exception should be interpreted broadly. In this case, the plan was for government employees and their dependents; its trustees consisted of government employees who established and maintained the plan, and it was partially funded with government money. I believe that this plan

was exempt from ERISA and that none of the plaintiffs' claims are preempted. Therefore, I must dissent from that portion of the majority's opinion holding that certain claims were preempted.

SHORES, JUSTICE (concurring in part and dissenting in part). I concur in part II of the opinion and join Justice Maddox's dissent as to Part I.

Almon, J., concurs.

HOUSTON, JUSTICE (concurring in part; dissenting in part).

See my dissent in *HealthAmerica v. Menton*, [Ms. 87-1100, July 21, 1989] _____ So.2d _____ (Ala. 1989). I would reverse and remand to permit the plaintiffs to amend their fraud cause of action to proceed with a cause of action under ERISA, 29 U.S.C. § 1132(a). Therefore, I concur in part and dissent in part.

APPENDIX C

(Notice Dated November 17, 1989)

HARBOR INSURANCE COMPANY,
LIFE & HEALTH SERVICES, INC., et al.
Appellant

v.

Robert E. Blackwelder, et al.
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Application for rehearing overruled. No opinion written on rehearing. Jones, J. Hornsby, CJ., Adams, Steagall and Kennedy, J.J., concur; Maddox, Almon, Shores and Houston, J.J., concur in part and dissent in part.

11/17/89
bsa

Robert G. Esdale, Clerk
Supreme Court of Alabama

APPENDIX D

(Motion Filed July 12, 1983)

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
Civil Action No. 83-640-G

LIFE & HEALTH INSURANCE
SERVICES, INC.,
of Alabama corporation
PETITIONER

vs.

ALABAMA JUNIOR/COMMUNITY
COLLEGES AND TECHNICAL COLLEGES
EMPLOYEE BENEFIT PLAN, etc. et. als.
RESPONDENTS

MOTION TO DISMISS

Comes now Robert E. Blackwelder, a Defendant in the above entitled cause, individually and as a proposed representative of a class of employees and claimants, and appearing specially, and without consenting to the jurisdiction of this Court, files this Motion to Dismiss, pursuant to the Alabama Rules of Civil Procedure, and assigns the following separate and several grounds:

1. This Court is without jurisdiction of the subject matter of this complaint.

2. Congress has pre-empted the field and subject matter of Employee Benefit Plans such as that described and made the subject matter of this complaint.

3. The complaint states no cause of action recognizable under state law.

4. Federal courts have exclusive subject matter jurisdiction of the matters complained of in the complaint.

5. This complaint is not brought by a participant or beneficiary to recover plan benefits or to clarify future rights and is therefore not within the concurrent jurisdiction of state courts.

Respectfully submitted,

BAXLEY, BECK & DILLARD

BY: _____

George Beck
Attorney for Blackwelder, Defendant
P.O. Box 5019
305 South Lawrence Street
Montgomery, AL 36103-5019
205/832-4878

APPENDIX E

(Motion Filed July 12, 1983)

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
Civil Action No. 83-640-G

LIFE & HEALTH INSURANCE
SERVICES, INC.,
of Alabama corporation
PETITIONER

vs.

ALABAMA JUNIOR/COMMUNITY
COLLEGES AND TECHNICAL COLLEGES
EMPLOYEE BENEFIT PLAN, etc. et. als.
RESPONDENTS

MOTION TO DISMISS

Comes now Mary R. Holley and Sarah B. Everage, Defendants in the above entitled cause, individually and as a proposed representative of a class of employees, and appearing specially, and without consenting to the jurisdiction of this Court, files this Motion to Dismiss, pursuant to the Alabama Rules of Civil Procedure, and assigns the following separate and several grounds:

1. This Court is without jurisdiction of the subject matter of this complaint.

2. Congress has pre-empted the field and subject matter of Employee Benefit Plans such as that described and made the subject matter of this complaint.

3. The complaint states no cause of action recognizable under state law.

4. Federal courts have exclusive subject matter jurisdiction of the matters complained of in the complaint.

5. This complaint is not brought by a participant or beneficiary to recover plan benefits or to clarify future rights and is therefore not within the concurrent jurisdiction of state courts.

Respectfully submitted,

BAXLEY, BECK & DILLARD

BY: _____

George Beck
Attorney for Holly & Everage, Defendants
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Montgomery, AL 36103-5019
205/832-4878

APPENDIX F

(Order Entered August 18, 1983)

CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT
MONTGOMERY COUNTY, ALABAMA
CASE NO. CV-83-640-G

LIFE & HEALTH SERVICE, INC.,
Plaintiff,

vs.

ALABAMA JUNIOR/COMMUNITY
COLLEGES AND TECHNICAL COLLEGES, et al.,
Defendants.

The court having read and considered defendants' Motions to Dismiss, it is ORDERED that defendants Blackwelder, Holley, Everage, Harbor and Dill's Motions are DENIED and defendants shall file their Answers within ten (10) days from the date of this Order.

DONE and ORDERED in chambers this 18th day of August, 1983.

_____

WILLIAM R. GORDON
Circuit Judge

Robert Alton
Larry Lewiski
Thomas Dean
Kenneth Cooper
Richard Allen
John Matthews
George Beck
Robert Abrams

APPENDIX G

(Motion Filed April 22, 1987)

IN THE CIRCUIT COURT
FOR
MONTGOMERY COUNTY, ALABAMA
CIVIL ACTION NO. CV-83-640-G

Robert E. Blackwelder, et al.,
Plaintiffs,

vs.

ALABAMA JUNIOR/COMMUNITY COLLEGES,
et al.,
Defendants.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Harbor Insurance Company moves the Court to enter partial summary judgment on the claims and issues specified hereinbelow:

1. Count II of the Crossclaim of Alabama Junior/Community Colleges and Technical Colleges Employee Benefit Plan ("Plan") against Harbor, alleging negligence.

2. Count III of the Crossclaim of the Plan against Harbor, alleging fraud.

3. The issue of an agency relationship between Harbor, as principal, and Life & Health Services, Inc., and/or any of its officers, agents or employees, as agents.

4. The preemption of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001, et seq. (ERISA) of the negligence, wantonness, fraud and fraudulent concealment claims of the plaintiffs against Harbor, and the negligence, breach of contract and fraud claims of the Plan against Harbor.

5. The claim of the plaintiffs against Harbor seeking extra-contractual and punitive damages under its claim alleging liability pursuant to ERISA.

As grounds for said motion, defendant Harbor avers the following:

1. As to Counts II and III of the Plan's Crossclaim against Harbor, said claims are barred by the Statute of Limitations, and as to such matter there exists no genuine issue as to any material fact and Harbor is entitled to judgment in its favor as a matter of law.

2. As to the issue of an agency relationship between it as principal and Life & Health Services, Inc., and/or any of its officers, agents and employees, as agents, there exists no genuine issue to any material fact and Harbor is entitled to a declaration that no such agency relationship exists, as a matter of law.

3. As to the issues of the preemption of the negligence, wantonness, fraud, fraudulent concealment and breach of contract claims of the plaintiffs and the Plan, respectively, against Harbor, such issue is a question of law, and any factual disputes presented by the record do not constitute genuine issues of material facts concerning the issue of preemption.

In support of said Motion for Partial Summary Judgment, defendant Harbor offers the following:

1. The original Petition for Declaratory Judgment and Other Relief filed by Life & Health Services, Inc., to commence this proceeding.

2. The original answers, and all amendments thereto, filed by all parties to this action.

3. The Counterclaim/Crossclaim, and all amendments thereto, of the now plaintiff classes against all other parties to this action.

4. The answers and/or replies of all parties to the Counterclaim/Crossclaim of the now plaintiff classes, and all amendments thereto.

5. The Crossclaim of the Plan against Harbor.

6. Harbor's Answer to the Crossclaim of the Plan.

7. All evidence offered in support of or in opposition to any previously filed Motion for Summary Judgment, by Harbor or any other party.

8. The depositions of Robert Wilder, Judith Reif, Eugene Allen, Robert Percival, Edward Addy, Robert Markwith, and William H. McWhorter.

DEFENDANT HARBOR REQUESTS PERMISSION TO BRIEF AND PRESENT ORAL ARGUMENT RESPECTING THE MERITS OF THIS MOTION.

_____

Clyde C. Owen, Jr.
Attorney for Defendant
Harbor Insurance Company

OF COUNSEL:

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APPENDIX H

(Brief Filed April 26, 1988)

IN THE SUPREME COURT
OF ALABAMA
CASE NUMBERS: 87-391, 87-407, 87-487

HARBOR INSURANCE COMPANY and
LIFE AND HEALTH SERVICES, INC.,
Appellants,

vs.

ROBERT E. BLACKWELDER, etc., et al.,
On Appeal From The Circuit Court for Montgomery County
Appellees.

BRIEF OF APPELLANT
HARBOR INSURANCE COMPANY

Clyde C. Owen, Jr.
Gerald C. Swann, Jr.
Attorneys for Appellant
Harbor Insurance Company

OF COUNSEL:

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(205) 834-7680

ORAL ARGUMENT REQUESTED

(Appellant's Brief—Alabama Supreme Court)

STATEMENT OF ISSUES

I. Whether the Governmental Plan Exemption from ERISA Applies To The Plan.

29 USC §1001(a)
29 USC §1002(32)
29 USC §1003(b)
29 USC §1144(b) (2) (B)
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. _____, 95 L.Ed.2d. 39, 107 S.Ct. 1549 (1987)
Rose v. Long Island R.R. Pension Plan, 828 F.2d 910 (2d Cir. 1987)

II. Whether the Evidence Justified Submitting the Employees' Negligence Claims Against Harbor to the Jury.

Jones v. Newton, 454 So.2d 1345 (Ala. 1984)
Sungas, Inc. v. Perry, 450 So.2d 1085 (Ala. 1984)
Hall v. Booth, 423 So.2d 184 (Ala. 1982)
Metropolitan Life Ins. Co. v. James, 238 Ala. 337, 191 So. 352 (1939)
Lazzara v. Howard A. Esser, Inc., 802 F.2d 260 (7th Cir. 1986)
§6-5-102, *Code of Alabama*, 1975
§27-8-1(c), *Code of Alabama*, 1975
§27-8-5(c), *Code of Alabama*, 1975

III. Whether the Holley Class Judgment for Mental Anguish Can Stand Absent Proof of Actual Damages.

Vincent v. Blue Cross-Blue Shield of Alabama, 373 So.2d 1054 (Ala. 1979).
Alabama Power Company v. Harmon, 483 So.2d 386 (Ala. 1986)
B&M Homes, Inc. v. Hogan, 376 So.2d 667 (Ala. 1979)
Restatement (2d) Torts, §436A

H3

(Brief Filed June 16, 1988)

IN THE SUPREME COURT
OF ALABAMA
CASE NUMBERS: 87-391, 87-407, 87-487

HARBOR INSURANCE COMPANY and
LIFE AND HEALTH SERVICES, INC.,
Appellants,

vs.

ROBERT E. BLACKWELDER, etc., et al.,
Appellees

On Appeal From The Circuit Court for Montgomery County

BRIEF OF APPELLEE ROBERT E. BLACKWELDER, ET AL.

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(Appellees' Brief—Alabama Supreme Court)

ISSUES PRESENTED FOR REVIEW

I

THE EVIDENCE MORE THAN JUSTIFIED SUBMITTING THE EMPLOYEE'S NEGLIGENCE CLAIMS AGAINST HARBOR TO THE JURY.

Hand v. Butts, 289 Ala. 653, 270 So.2d 789.

Beasley v. MacDonald Engineering Company, 287 Ala. Ala. 189, 249 So.2d844 (Ala. 1971).

Restatement of the Law, 2d Tort 2d, Section 324(a).

Fireman's Fund American Insurance Company v. Coleman, 394 So.2d 334 (Ala. 1981).

Kennedy v. City of Montgomery, 423 So.2d 187 (Ala. 1980).

Fricke v. City of Guntersville, 254 Ala. 370, 48 So.2d 420 (Ala. 1950).

Berkell and Company Contractors, Inc. v. Providence Hospital, 454 So.2d 496 (Ala. 1984).

Federal Mogul Corporation v. Universal Construction Company, 378 So.2d 716 (Ala. 1979).

McGaha v. Steadman, 410 So.2d 420 (Ala.Civ.App. 1981).

Williams v. The Jackson Company, 359 So.2d 798 (Ala.Civ.App. 1978).

H5

Daley v. City of Birmingham, 378 So.2d 728 (Ala. 1979).

Ziegler v. Blount Brothers Construction Company, 364 So.2d 1163, 1167 (Ala. 1978).

Harvard v. Palmer and Baker Engineers, Inc., 293 Ala. 301, 307, 302 So.2d 228, 232 (Ala. 1974).

North Carolina Mutual Life Insurance Company v. Mattie Holley, [M.S. 84-1211, 1223, Sept. 19, 1987], ___ So.2d ___ (1987).

II

WHETHER THIS WAS A GOVERNMENT PLAN

Krupp v. Lincoln University, 663 F.Supp. 289 (E.D.Pa. 1987).

Feinstein v. Lewis, 477 F.Supp. 1256 (S.D.N.Y., 1979).

Rose v. Long Island R.R. Pension Plan, 828 F.2d 910 (C.A.2, 1987).

Private Opinion Letter 79-36A, Department of Labor

Private Opinion Letter 81-82A, Department of Labor

Private Opinion Letter 83-24A, Department of Labor

Private Opinion Letter 86-24A, Department of Labor

III

WHETHER THE HOLLEY CLASS CAN RECOVER FOR MENTAL ANGUISH

Cates v. Taylor, 428 So.2d 637 (Ala. 1983).

Taylor v. Baptist Medical Center, 400 So.2d 369 (Ala. 1981).

American Road Insurance Company v. Inmon, 394 So.2d (Ala. 1980).

APPENDIX I

LIST OF AFFILIATE COMPANIES OF RESPONDENT HARBOR INSURANCE COMPANY

AFCO Agent Service Corporation
The Buckeye Union Insurance Company
Boston Old Colony Insurance Company
Casualty Insurance Company
Workers Compensation and Indemnity Company of California
First Fire and Casualty of Hawaii, Ltd.
First Indemnity Insurance of Hawaii, Inc.
The Mayflower Insurance Company, Ltd.
Niagara Fire Insurance Company
The Continental Insurance Company
AFCO Credit Corporation
Puerto Rican-American Insurance Company
Preferred Risk Insurance Company
Security National Life Insurance Company
Deutsche Continental Reinsurance, A.G.
The Hong Kong Fire Insurance Company, Ltd.
Lombard Insurance Company, Limited
Lombard General Insurance Company, Ltd.
The Continental Insurance Company (Europe), Limited
The Continental Insurance Company (U.K.), Limited
Marine Office of America (UK), Limited
Continental Reinsurance Corporation (U.K.), Limited
Unionamerica Management Company, Limited
Union American Leasing Company, Limited
Continental Risk Services, Ltd.
The CPI Group, Inc.
California Central Bank Trust Corporation
CPI Pension Services, Inc.
Settlement Options, Inc.

East River Insurance Company (Bermuda), Ltd.
Continental Reinsurance Corporation International, Limited
East River Insurance Company, Ltd.
Deutsche Continental Reinsurance, A.G.
Continental Holdings (Bermuda), Ltd.
Inter-Continental Seguradora S.A.
The Fidelity and Casualty Company of New York
CTEX, Inc.
Firemen's Insurance Company of Newark, N.J.
Commercial Insurance Company of Newark, N.J.
Continental Lloyd's Insurance Company
The Continental Insurance Company of N.J.
The Glens Falls Insurance Company
The Continental Insurance Company of Canada
The Dominion Insurance Corporation
Continental Insurance Management, Ltd.
TCC Acquisition Corporation
Continental Asset Management Corporation
Kansas City Fire and Marine Insurance Company
Marine Office of America Corporation
Associated Aviation, Inc.
Hull & Cargo Surveyors, Inc.
Global Marine Services, Ltd.
United States P&I Agency
Marine Office of America Corporation
National-Ben Franklin Insurance Company of Illinois
Bayside Reinsurance Company, Ltd.
Continental Loss Adjusting Services, Inc.
UAC Rehabilitation International, Inc.
Continental Rehabilitation Resources, Inc.
Pacific Insurance Company
Lombard Continental Insurance
Lombard Insurance Holding, Ltd.
Continental Pacific Insurance Company, Ltd.